

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

MICHAEL E. WILLIAMS,

Plaintiff(s),

v.

BANK OF AMERICA, N.A., et al.,

Defendant(s).

Case No. 2:16-CV-00199 JCM (PAL)

ORDER

Presently before the court are defendants' motions to dismiss the complaint. (ECF Nos. 5, 8). Bank of America, N.A., Countrywide Home Loans, Inc., and the Bank of New York Mellon (collectively referred to as "BANA") filed a joint motion to dismiss. (ECF No. 5). Bank of New York and Residential Credit Solutions, Inc. (collectively referred to as "BONY") filed an additional joint motion to dismiss. (ECF No. 8). Plaintiff Michael E. Williams filed a response to both. (ECF Nos. 17, 20). Defendants each filed a reply. (ECF Nos. 28, 19).

**I. Background**

On or about June 29, 2004, plaintiff purchased the property located at 1600 Eaton Drive, Las Vegas, Nevada, 89102 ("the property"). (ECF No. 8). To pay for the property, plaintiff executed a promissory note amounting to \$308,000 with Countrywide as the lender. (*Id.*) Thereafter, plaintiff entered into a deed of trust securing the loan. (*Id.*). Mortgage Electronic Registration Systems, Inc. ("MERS") was named as the beneficiary and CTC Real Estate Services as the trustee. (*Id.*). BANA later acquired Countrywide and MERS assigned the deed of trust to BONY. (*Id.*). BONY recorded a substitution of trustee naming Sables LLC ("Sables") as trustee, making it the current trustee. (*Id.*). Sables then notified plaintiff he was delinquent on the loan and owed over \$140,000. (*Id.*)

1           Thereafter, Sables opted to sell the property on behalf of BONY. (*Id.*). Plaintiff then opted  
 2 for, and initiated, the mediation process. (*Id.*). In December 2014, the mediation concluded,  
 3 determining that plaintiff did not qualify for loan modification. (*Id.*). Soon after, Sables initiated  
 4 foreclosure proceedings and sold the property on January 19, 2016. (*Id.*).

5           Plaintiff, from the time he received the loan and the notice of foreclosure, alleges he called  
 6 the defendants on multiple occasions to gain access to the disclosure of terms and conditions, loan  
 7 modification procedures, as well as other documents. (ECF No. 1-1 ¶¶ 14, 33–36). As a result of  
 8 these occurrences, plaintiff initiated the present action. (*Id.*). In his complaint he alleges ten claims  
 9 for relief: (1) intentional misrepresentation; (2) rescission based upon fraud; (3) negligent  
 10 foreclosure; (4) permanent injunction and declaratory relief; (5) violation of the Federal Truth in  
 11 Lending Act; (6) unfair and deceptive acts and practices; (7) usury; (8) violation of the Real Estate  
 12 Settlement Procedures Act; (9) unjust enrichment; and (10) recoupment. (ECF No. 1-1).

## 13       **II.     Legal standard**

### 14           *a. Motion to dismiss*

15           The court may dismiss a plaintiff’s complaint for “failure to state a claim upon which relief  
 16 can be granted.” Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide “[a] short and  
 17 plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2).  
 18 Although rule 8 does not require detailed factual allegations, it does require more than labels and  
 19 conclusions. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Furthermore, a formulaic  
 20 recitation of the elements of a cause of action will not suffice. *Ashcroft v. Iqbal*, 556 U.S. 662, 677  
 21 (2009) (citation omitted). Rule 8 does not unlock the doors of discovery for a plaintiff armed with  
 22 nothing more than conclusions. *Id.* at 678–79.

23           To survive a motion to dismiss, a complaint must contain sufficient factual matter to “state  
 24 a claim to relief that is plausible on its face.” *Id.* A claim has facial plausibility when the plaintiff  
 25 pleads factual content that allows the court to draw the reasonable inference that the defendant is  
 26 liable for the misconduct alleged. *Id.* When a complaint pleads facts that are merely consistent  
 27 with a defendant’s liability, and shows only a mere possibility of entitlement, the complaint does  
 28 not meet the requirements to show plausibility of entitlement to relief. *Id.*

1 In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to apply  
 2 when considering a motion to dismiss. *Id.* First, the court must accept as true all of the allegations  
 3 contained in a complaint. However, this requirement is inapplicable to legal conclusions. *Id.*  
 4 Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. *Id.*  
 5 at 678. Where the complaint does not permit the court to infer more than the mere possibility of  
 6 misconduct, the complaint has “alleged – but not shown – that the pleader is entitled to relief.” *Id.*  
 7 at 679. When the allegations in a complaint have not crossed the line from conceivable to plausible,  
 8 plaintiff’s claim must be dismissed. *Twombly*, 550 U.S. at 570.

9 The Ninth Circuit addressed post-*Iqbal* pleading standards in *Starr v. Baca*, 652 F.3d 1202,  
 10 1216 (9th Cir. 2011). The *Starr* court held,

11 First, to be entitled to the presumption of truth, allegations in a complaint or  
 12 counterclaim may not simply recite the elements of a cause of action, but must  
 13 contain sufficient allegations of underlying facts to give fair notice and to  
 14 enable the opposing party to defend itself effectively. Second, the factual  
 allegations that are taken as true must plausibly suggest an entitlement to relief,  
 such that it is not unfair to require the opposing party to be subjected to the  
 expense of discovery and continued litigation.

15 *Id.*

16 *b. Local rule 7-2*

17 “The failure of the opposing party to file points and authorities in response to any motion  
 18 shall constitute a consent to granting the same.” D. Nev. 7-2(d). This failure-to-oppose rule does  
 19 not apply solely to failure to file a physical document, but also to failure to assert in an  
 20 opposition arguments that oppose those presented in the motion. *See, e.g., Duensing v. Gilbert*,  
 21 2013 WL 1316890 (D. Nev. Mar. 1, 2013) (failing to respond to defendant’s arguments on the  
 22 issue constituting consent to the granting of the motion); *Schmitt v. Furlong*, 2013 WL 432632  
 23 (D. Nev. Feb. 4, 2013) (failure to argue against substantive due process violations indicated  
 24 consent to granting summary judgment); *Gudenavichene v. Mortgage Elec. Registration Sys.*,  
 25 No. 2:11-cv-01747-GMN-VCF, 2012 WL 1142868 (D. Nev. Apr. 4, 2012) (plaintiff’s failure  
 26 to respond to any of the arguments raised in the motion to dismiss constituted consent to granting  
 27 the motion).  
 28

### 1      **III. Discussion**

#### 2            *a. Statutes of limitation preclusion*

3            Both defendants argue that the first two claims, intentional misrepresentation and  
 4      rescission based upon fraud, are barred by a three-year statute of limitations under NRS §  
 5      11.190(3)(d). (ECF No. 5). Defendants also argue the fifth and eighth claims, Truth-in-Lending  
 6      Act (“TILA”) and Real Estate Settlement Procedure Act (“RESPA”) violations, are further barred  
 7      by the statutes of limitation under 12 U.S.C. § 2614 and 15 U.S.C. § 1640(e), respectively. (ECF  
 8      No. 8). Defendants claim that plaintiff’s fraud claims began running in 2004 and are, therefore,  
 9      barred by statutes of limitation. (ECF No. 5). Plaintiff responds that the claims are not barred  
 10     because he did not discover the fraud until 2015 when he was denied a loan modification. (ECF  
 11     No. 17). Defendant BONY replies that plaintiff’s inaction began in 2005 and should not excused  
 12     by equitable tolling. (ECF No. 28).

13            “The general rule concerning statutes of limitations is that a cause of action accrues when  
 14     the wrong occurs and a party sustains injuries for which relief could be sought.” *Petersen v. Bruen*,  
 15     792 P.2d 18, 20 (Nev. 1990). The expiration of a statute of limitations may be decided by law only  
 16     when uncontroverted evidence proves the plaintiff discovered (“discovery rule”) or should have  
 17     discovered the fraudulent conduct. *See Nevada Power Co. v. Monsanto Co.*, 955 F.2d 1304, 1307  
 18     (9th Cir. 1992). Under this discovery rule, a claim tolls upon the discovery by the aggrieved party  
 19     of the facts constituting the fraud. *See Cheung v. Wells Fargo Bank*, 987 F.Supp.2d 972, 978 (N.D.  
 20     CA. 2013).

21            In the current action, there are three relevant statutes of limitation. NRS § 11.190(3)(d) has  
 22     a three-year statute of limitations beginning with discovery. *See Siragusa v. Brown*, 971 P.2d 801,  
 23     806 (Nev. 1998) (citing NEV. REV. STAT. § 1190(3)(d)). TILA has a one-year statute of limitations.  
 24     15 U.S.C. § 1635(e). Finally, RESPA has a one-year statute of limitations. 12. U.S.C. § 2614.

25            Plaintiff asserts he did not become aware of the underlying facts until he was denied a loan  
 26     modification. (ECF No. 21 ¶ 4). However, in his complaint, plaintiff references phone calls made  
 27     to defendants prior to 2009. (*See* ECF No. 1-1 ¶¶ 34–36, 39). Plaintiff states he was lied to during  
 28     these phone calls, saying that he “knew these statements were false.” (*Id.*). Even if plaintiff

1 believed the statements were false, there were grounds for a claim under the discovery rule before  
 2 2009. Plaintiff was aware of the underlying facts. Although he chose to ignore or not believe them,  
 3 that does not prevent the statute of limitations from tolling. Thus, the statutes of limitation began  
 4 to run, at the latest, in 2009, which bars the claims under NRS § 11.190(3)(d), TILA, and RESPA.

5 Courts may apply equitable tolling if the statute of limitations has expired. *See City of N.*  
 6 *Las Vegas v. State Local Gov't Employee-Mgmt. Relations Bd.*, 261 P.3d 1071, 1077 (Nev. 2011).  
 7 Moreover, equitable tolling has been applied to TILA and other similar federal statutes. *King v.*  
 8 *State of Cal.*, 784 F.2d 910, 911 (9th Cir. 1986). Under equitable tolling, a party initiating a claim  
 9 after the statute of limitations has expired may be excused if a reasonable plaintiff would not have  
 10 known of the possible claim within the time period allowed by statute. *See id.*

11 Plaintiff does not allege he had inadequate time to recover facts. Plaintiff further does not  
 12 allege he needed more time to secure enough facts. (*see* ECF No. 1-1). Thus, claims one, two, five,  
 13 and eight are barred because equitable tolling does not apply and the statutes of limitation have  
 14 run. Accordingly, the court dismisses these claims with prejudice.

15 *b. Negligent foreclosure*

16 Plaintiff's third claim is for negligent foreclosure. (ECF No. 1-1). Defendant BANA argues  
 17 that plaintiff's claim for negligent foreclosure fails as a matter of law because lenders have no duty  
 18 of care to a borrower. (ECF No. 5). Further, defendant BONY claims that plaintiff's negligent  
 19 foreclosure claim does not plead two necessary elements (ECF No. 21).

20 The elements of negligent foreclosure are: (1) defendant (a lender) owed a duty of care to  
 21 plaintiff; (2) defendant breached the duty; (3) defendant's breach was the actual and proximate  
 22 cause of the foreclosure; and (4) plaintiff was injured. *See Larson v. Homecomings Fin., LLC*, 680  
 23 F. Supp. 2d 1230, 1235 (D. Nev. 2009). A lender, however, does not owe a duty of care to a  
 24 borrower beyond the initial qualification process. *See Id.* at 1234. Further, a plaintiff cannot sue  
 25 for wrongful foreclosure if he failed to tender payments when due. *See Wensley v. First Nat. Bank*  
 26 *of Nevada*, 874 F.Supp.2d 957, 965 (D. Nev. 2012).

27 Plaintiff's claim for negligent foreclosure fails because (1) defendants do not owe plaintiff  
 28 a duty, and (2) plaintiff has not pled that he can tender payments to the lender. Plaintiff admits in

1 the complaint that he “fell behind on the note and deed of trust payment” on the property. (ECF  
 2 No. 1-1 ¶ 31). In his complaint, plaintiff does not plead that he is able to pay his loan back to avoid  
 3 default. Thus, plaintiff cannot demonstrate a negligent foreclosure claim under Nevada law.

4 *c. Unfair and deceptive trade practices and unjust enrichment*

5 Plaintiff’s sixth claim is for unfair and deceptive acts and practices. (ECF No. 1-1).  
 6 Plaintiff’s ninth claim for unjust enrichment. *Id.* Responding to the unfair and deceptive acts and  
 7 practices claim, defendants argue that plaintiff does not sufficiently plead the type of deceptive  
 8 trade practice alleged against defendants as required by NRS 598.0915. (ECF Nos 5,8).  
 9 Responding to plaintiff’s unjust enrichment claim, defendants argue plaintiff does not adequately  
 10 plead a claim for relief because a valid contract existed between the parties. (*Id.*). Plaintiff did not  
 11 respond to either of these arguments. This permits the court to dismiss both of plaintiff’s claim  
 12 pursuant to Local Rule 7-2(d). *See, e.g., Duensing*, 2013 WL 1316890. Accordingly, the court  
 13 dismisses the sixth claim for unfair and deceptive acts and practices.

14 *d. Relief based claims*

15 Plaintiff’s fourth claim is for injunctive relief, the seventh claim is for usury, and the tenth  
 16 claim is for recoupment. (ECF No. 1-1). Defendants argue the claims should be dismissed because  
 17 (1) plaintiff’s fourth claim is not a separate cause of action; (2) plaintiff’s seventh claim for usury  
 18 is not legally cognizable in Nevada; and (3) plaintiff’s tenth claim is a remedy and therefore,  
 19 dependent on the other claims. (ECF Nos. 5, 8).

20 Plaintiff’s fourth claim for injunctive and declaratory relief is dismissed because it is a  
 21 remedy, not a legally cognizable claim. The court follows the well-settled rule that a claim for  
 22 “injunctive relief” standing alone is not a cause of action. *See, e.g., In re Wal-Mart Wage & Hour*  
 23 *Employment Practices Litig.*, 490 F.Supp.2d 1091, 1130 (D. Nev. 2007); *Tillman v. Quality Loan*  
 24 *Serv. Corp.*, No. 2:12-CV-346 JCM RJJ, 2012 WL 1279939, at \*3 (D. Nev. Apr. 13, 2012)  
 25 (“[I]njunctive relief is a remedy, not an independent cause of action.”); *Jensen v. Quality Loan*  
 26 *Serv. Corp.*, 702 F.Supp.2d 1183, 1201 (E.D. Cal. 2010) (“[A] separately pled claim or cause of  
 27 action for injunctive relief is inappropriate.”). Injunctive relief may be available if plaintiff is  
 28 entitled to such a remedy on an independent cause of action.

1 Usury is no longer a cause of action in Nevada. *See Tatro v. Homecomings Fin. Network,*  
2 *Inc.*, 3:10-cv-00346-RCJ-RAM, 2011 WL 240255, at n.1 (D. Nev. Jan. 20, 2011). Under Nevada  
3 law, parties may agree to any interest amount. *See* NRS § 99.050. Usury was superseded by NRS  
4 § 99.050; therefore, plaintiff's usury claim is dismissed with prejudice.

5 Plaintiff's tenth claim for recoupment is not legally cognizable. Recoupment is a "right of  
6 the defendant. . . ." not the plaintiff. *Schettler v. RalRon Capital Corp.*, 275 P.3d 933, 941 (Nev.  
7 2012) (citing *Black's Law Dictionary* 1275 (6th ed.1990)). Recoupment can only be asserted as a  
8 affirmative defense. *Id.* Plaintiff's tenth claim is dismissed with prejudice because recoupment  
9 cannot be pled in a complaint.

10 Accordingly, the court dismisses plaintiff's claim for injunctive relief.

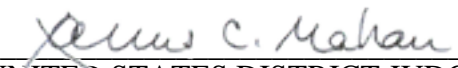
11 **IV. Conclusion**

12 Accordingly,

13 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Bank of America, North  
14 America, and Bank of New York's motions to dismiss the complaint (ECF Nos. 5, 8) be, and the  
15 same hereby are, GRANTED, consistent with the foregoing.

16 The clerk is instructed to close the case.

17 DATED July 18, 2016.

18   
19 \_\_\_\_\_  
UNITED STATES DISTRICT JUDGE